

Chapter 4

Decisions to initiate prosecutions and the provision of legal services

4.1 This chapter examines issues surrounding decisions to initiate prosecutions, the provision of legal advice for the initiation and conduct of prosecutions, and the availability of legal services for members charged with offences under the DFDA. It also considers the impact of the Director of Military Prosecutions on the administration of criminal and disciplinary processes.

Decisions to Prosecute

4.2 Decisions to conduct prosecutions are based on DI(G) PERS 45-4 *Australian Defence Force Prosecution Policy*. According to DI(G) PERS 45-4, prosecuting charges under the DFDA is an important means of maintaining discipline in the ADF. Further:

The initial decision whether or not to prosecute is the most important step in the prosecution process. A wrong decision to prosecute, and conversely a wrong decision not to prosecute, tends to undermine confidence in the military discipline system.¹

4.3 DI(G) PERS 45-4 provides that decisions to initiate and continue prosecutions under the DFDA rest with commanding officers.² It also outlines the factors that should govern a commander's decision to prosecute. The 'fundamental question' for any commander is whether the prosecution serves the public interest (defined primarily as the maintenance of Service discipline).³ In reaching this decision, commanders must consider:

- whether the admissible evidence available is capable of establishing the offence;
- whether there is a reasonable prospect of achieving a conviction; and
- other discretionary factors, such as consistency and fairness, operational requirements, deterrence, seriousness of the offence, interests of the victim, nature of the offender, prior conduct, degree of culpability, effect upon morale and delay in dealing with matters.⁴

4.4 When a Service member is charged, commanding officers or subordinate summary authorities (appointed by commanding officers) decide whether to proceed

1 DI(G) PERS 45-4, para. 2. See also ADFP201 Volume 1, *Discipline Law Manual*, para. 4.2.

2 DI(G) PERS 45-4, para. 1.

3 DI(G) PERS 45-4, para. 8.

4 DI(G) PERS 45-4.

with the matter. Commanding officers also decide the way in which the matter will be conducted (the form of the tribunal, etc). As such, under current arrangements, decisions to initiate and proceed with prosecutions are located squarely and wholly within the chain of command.

Flawed decisions to prosecute

4.5 The committee has received evidence of two disturbing instances evidencing significantly flawed decisions to prosecute. These two cases highlight problematic aspects of prosecutorial decision-making processes.

4.6 In the SAS soldier's case, flowing on from the investigative shortcomings discussed in Chapter 3, the decision to prosecute was similarly defective. Evidence before the committee reveals the decision to prosecute was based on unsworn, untested, unreliable, non-corroborating inculpatory 'evidence', compiled long after the event, from witnesses that would not and could not testify at the soldier's trial. This was coupled with a concomitant failure to consider the significant body of exculpatory evidence when deciding to prosecute.⁵

4.7 Evidence to the committee overwhelmingly supports the conclusion that adequate steps were not taken to ensure that the initial decision to prosecute complied with the ADF's prosecution policy.⁶ Moreover, when it became apparent to the prosecutor that a prosecution could not succeed, the policy was again contravened by its continuation, regardless of the high likelihood of failure.⁷

4.8 The committee is also aware that the full Federal Court found the decision to initiate a prosecution against Mr Michael Hoffman, a Major in the Australian army, was flawed.⁸ In this instance, charges were laid seven years after the alleged incident, in a manner designed to avoid time limitations imposed under the DFDA barring the prosecution. The court found that the attempt to charge Mr Hoffman in this manner was invalid—the decision to prosecute should not have been made. Mr Griffin, commenting on this case, states:

The costs to the public purse of the lengthy investigation and protracted prosecution and the multiple appeals to the Defence Force Discipline Appeals Tribunal (DFDAT) and Federal Court are substantial.⁹

5 Confidential *Submission C4*; *Committee Hansard*, 1 March 2004; and *IGADF—Commissioned Report*.

6 Confidential *Submission C4*; General Peter Cosgrove, Chief of Defence Force, *Submission P16*, p. 79.

7 *IGADF—Commissioned Report*.

8 *Hoffman v Chief of Army* [2004] FCAFC 148.

9 Michael Griffin, *Issues Paper* para. 21.

4.9 As well as the financial costs flowing from the flawed decision to prosecute, the inordinate length of time taken to resolve the matter and the pressures associated with legal proceedings imposed extraordinary hardship on Mr Hoffman and his family.

Our family's psychological and emotional abuse suffered at the hands of the military justice system has been likened to repeated bashings with a baseball bat perpetuated by multiple unknown assailants on multiple occasions—never sure if it was the last bashing...Our journey is a horrific example of the appalling state of the military justice system, highlighting organisational deficiencies, the system barriers, the lack and/or failure to adhere to the relevant policies, processes or procedures. A complete abuse of process that began in 1998 and continued for seven years—a system in total disarray.¹⁰

4.10 Both these cases have had high public profiles and attracted considerable media attention. Again, the committee wonders how many other ADF members have endured a similar ordeal.

4.11 It is important to note that, when the initial decision to prosecute was made in both these instances, the Office of the Director of Military Prosecutions did not exist and therefore advice of the Director of Military Prosecutions was not sought.

Findings of previous inquiries

4.12 Previous inquiries have also highlighted problems with the disciplinary decision-making process, particularly the appropriateness of the CO's role as 'decision maker'. The 1995 Abadee report discussed the CO's multiple and potentially conflicting roles:

There is a particular view, indeed almost a consensus view, that provisions of the DFDA in allocating multiple roles to the CA [Convening Authority], including the initiation of prosecution, and review of CM [Courts Martial] (and DFM) proceedings, do raise legitimate concerns as to the appearance of fairness and impartiality of such trials, despite the specific precautions to protect against the improper or unlawful use of command influence and the wide range of procedural rights to guard against command influence...There is an acceptance that the system may be perceived to place the CA...in the position of determining whether there be a trial, the nature of the tribunal and charges, and selecting the trial judge, 'jury' and prosecutor, as well as reviewing the proceedings.¹¹

4.13 To avoid the difficulties presented by the multiple roles of the CO/convening authority, Justice Abadee recommended establishing an independent tri-Service Director of Military Prosecutions (DMP). The proposed DMP would assume a decision-making role similar to the Commonwealth, State or Territory Directors of

10 Confidential *Submission C10*, p. 10. Quoted with the permission of Mr and Mrs Hoffman.

11 *Abadee Report*, pp. 151–2.

Public Prosecutions, thereby removing decisions to prosecute from commanding officers. Justice Abadee argued there was a 'substantial case' in favour of doing this, claiming it would:

help to ensure a high degree of independence in the vital task of making prosecution decisions (including during a trial) and exercising prosecution discretions, and objectively assist in avoiding suspicions that prosecutorial discretions will be exercised save upon entirely 'neutral grounds'.¹²

4.14 In its 1999 *Military Justice* Report, the JSCFADT discussed the arguments for and against establishing the office of DMP. The joint committee expressed the view that a DMP would add to the perception of independence, provide consistency and assist to ensure that, as far as possible, the prosecution component of the trial process was impartial.¹³ The 2001 Burchett report also concluded that a DMP would be beneficial:

I have reached the view that, on balance, there is more to be gained from the early introduction of an independent DMP than from postponing the decision any further. In my opinion it would not only enhance the perception and reality of fairness in the system but, as the Judge Advocate General has observed, would also provide a more professional, unified and consistent approach to prosecution decisions.¹⁴

4.15 All reports commented on the experiences of other jurisdictions—most notably Canada and the UK. Both these countries had introduced independent DMPs to avoid perceptions of unfairness, and protect Service personnel's right to a fair and independent trial.

An independent Australian Director of Military Prosecutions?

4.16 In its March 2002 response to the JSCFADT's *Rough Justice* report, and following repeated recommendations contained in other reports and the success of developments overseas, the Government indicated that it would establish an independent Office of the Director of Military Prosecutions (ODMP).¹⁵ The *Government Response* stated that legislation to amend the DFDA would be proposed once the Chiefs of Staff Committee (COSC) had considered the DMP's appointment process and functions.¹⁶ Agreement on the establishment of an independent statutory DMP was reached on 19 February 2003.¹⁷

12 *ibid.*, p. 154.

13 JSCFADT 1999 Report, p. 135.

14 *Burchett Report*, p. 137.

15 *Government Response to ROUGH JUSTICE? An Investigation into Allegations of Brutality in the Army's Parachute Battalion*, March 2002, p. 3.

16 *ibid.*, p. 3.

17 General Peter Cosgrove, Chief of Defence Force *Committee Hansard*, 1 March 2004, p. 12.

4.17 The committee has been asked to examine the impact of the proposed ODMP.¹⁸ This encompasses an analysis of the institutional framework creating the ODMP, in addition to an evaluation of the practical operation of the office's activities.

The framework

4.18 Following COSC agreement on the structure and function of the ODMP, on 15 August 2003, DI(G) PERS 45-6 *Director of Military Prosecutions—Interim Implementation Arrangements* was issued. It states:

The establishment of the DMP is designed to enhance the independence and impartiality of the military prosecution process under the DFDA. The DMP will be an independent statutorily-appointed position separate to the chain of command.¹⁹

4.19 Under the auspices of DI(G) PERS 45-6, the DMP:

- provides pre-trial advice to convening authorities;
- conducts prosecutions at courts martial and DFM trials;
- provides legal advice to commanding officers to assist them in determining whether to charge an individual under the DFDA; and
- represents the ADF at appellate tribunals and courts.²⁰

4.20 Amendments to the DFDA are required to establish formally the statutorily independent DMP position. Under the current interim arrangements, the DMP is appointed through, and remains subject to, the chain of command. Decisions to initiate prosecutions therefore remain with commanding officers. The DMP acts purely in an advisory capacity—commanding officers are free to accept or reject any advice given.²¹

4.21 In a media release dated 30 June 2003, The Hon Danna Vale, Minister Assisting the Minister for Defence, stated:

I have directed Defence to expedite the development of the necessary legislation required to establish this position as a statutory appointment providing independent prosecutorial decision-making similar to that of Commonwealth, State and Territory Directors of Public Prosecution.²²

18 Foreign Affairs, Defence and Trade References Committee, *Inquiry into the Effectiveness of Australia's Military Justice System*, Reference Term (3).

19 DI(G) PERS 45-6, para. 2.

20 DI(G) PERS 45-6, para. 6.

21 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 2 August 2004, p. 56.

22 The Hon Danna Vale MP, 'Media Release', 30 June 2003.

4.22 In his submission to this inquiry, General Cosgrove indicated that legislation formally establishing the appointment was anticipated for introduction in 2004.²³ During evidence to the committee in March of 2004, the Director-General of the Defence Legal Service (DGTDLs), Air Commodore Harvey, also indicated that implementing legislation was 'imminent'.²⁴

4.23 The current DMP, Colonel Gary Hevey, appeared before the committee on 2 August 2004. He gave a compelling account of the need to introduce enabling legislation, the difficulties with current structural arrangements, and his frustration with the Government's inaction. Colonel Hevey informed the committee that the matter had been referred to the Attorney-General's Department, a drafter had been appointed, but the first draft of the legislation has not yet been forwarded to him for comment. He claimed:

I am caught between a rock and a hard place, where people demand statutory independence of me and do not give it to me.²⁵

4.24 He emphasised that the legislation was absolutely necessary to remove his position from the chain of command and guarantee the independence of his office:

I have just sat in the other room and watched the discussion concerning independence and how people can be said to be independent. The claim can be made of me: don't you have to report to the Chief of the Defence Force? The answer is, 'Yes, I do.' Why? Because he is my boss. Then the next question comes: 'When you chose to prosecute or not to prosecute Private Bloggs, General Smith, Admiral Jones or whoever it may be, were you influenced in that decision?' Until I am removed from the chain of command by the office being established properly, I cannot be independent. I must be a person who is within a chain of command somewhere. So, no, the position is not statutorily independent. Would I like it to be? Yes, please. How quickly? As quickly as you can possibly do it.²⁶

4.25 A committee member asked Colonel Hevey if the delay might be due to the complexity of the legislation. Colonel Hevey told the committee that a bill could be easily modelled on current statutes creating the various Commonwealth, State and Territory Directors of Public Prosecutions, adding 'this is not a massive task'.²⁷

23 General Peter Cosgrove, Chief of the Defence Force, *Submission P16*, p.18.

24 Air Commodore Simon Harvey, Director General Defence Legal Service, *Committee Hansard*, 1 March 2004, p. 55.

25 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 2 August 2004, p. 47.

26 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 2 August 2004, pp. 46-47.

27 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 2 August 2004, p. 57.

4.26 Colonel Hevey commented that, if and when the ODMP becomes statutorily independent, it will take over the decision-making function of some 33 one and two star officers in the military justice system. As was outlined above, the DMP currently acts in an advisory capacity. Decisions to initiate prosecutions still remain with commanding officers. The committee notes if legislation is passed establishing the ODMP, the decision-making function will be centralised. The control the DMP will then have over the decision-making function will go a considerable way towards improving the consistency of decision-making, and will reduce the likelihood that prosecutorial aberrations will occur in the future. Indeed, in his evidence to the committee, the SAS soldier stated:

The initiative of raising a Director of Military Prosecutions is a very positive step which will ensure that investigations and the briefs of evidence which are provided at the end of an investigation will be of the proper standard and should go a long way to stop unsustainable cases from going to DFDA action.²⁸

4.27 The committee holds the opinion that a statutorily independent DMP is a vital element of an impartial, rigorous and fair military justice system. It finds the Government's inaction unsatisfactory. Until such time as the promised legislation is passed, decisions to initiate prosecutions are not seen to be impartial, the DMP is not independent, and fundamentally, the discipline system cannot be said to provide impartial, rigorous and fair outcomes.

4.28 The Minister for Defence, Senator Robert Hill, was asked during the May 2005 Budget Estimates hearings whether the Government had drafted the necessary legislation creating the statutorily independent office of the DMP. Senator Hill acknowledged that it had taken "a very long time to get to this point", but indicated that legislation would be finally introduced into the Parliament during June 2005.²⁹

Assessment of current operation per TOR (3)

4.29 Aside from examining the structural arrangements for the ODMP, the committee has also examined its practical operation during the interim phase.

Case management and workload

4.30 In his evidence to the committee, Colonel Hevey indicated that the workload of the newly-established ODMP far exceeded original expectations. The Office's caseload was projected to total between 120 and 150 matters per year, with between 50 and 80 cases going to trial. In its first year of operation, however, the ODMP has dealt with in excess of 260 matters.³⁰ Furthermore:

28 In Camera *Committee Hansard*, 1 March 2004, p. 5.

29 FADT Legislation Committee *Estimates Hansard* 31 May 2005, p. 70.

30 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 2 August 2003, p. 49.

We are moving out of the advice stage into the advocacy stage; in other words, a lot of those matters that we have advised on are now heading to trial work. That will put further pressure on us because we will not have people in the office to do the advising because they will be doing their advocacy work.³¹

4.31 Workloads will also become heavier as awareness of the ODMP increases. Colonel Hevey indicated that a significant portion of his time over the past year has been devoted to elevating the profile of the Office within the Defence Forces. Despite a fairly high profile within Army (Colonel Hevey's own Service), the office remains 'relatively unknown' to many people in the Navy and Air Force.³² It can be expected that as the level of awareness rises in Air Force and Navy, there will be a concomitant rise in the number of cases referred.

4.32 An analysis of the operation of the ODMP reveals that there are significant differences between projected and actual caseloads. The volume of work is already double that originally anticipated, placing considerable pressure on office personnel. This situation is unlikely to improve if the profile of the office is elevated within the ADF, if matters currently 'on the books' move from the advice stage into advocacy, and if staffing remains at current levels. A service and resource review is required in order to ensure that as the volume of work increases, client requirements are met.

Personnel—permanent legal and administrative staff

4.33 The ODMP was established on 1 July 2003 and is located in Sydney. It has a staff of ten personnel, comprising the Director, Deputy Director, six prosecutors, a Service police investigator and a paralegal. The Deputy Director and the prosecutors are Permanent Legal Officers (PLO's) drawn from all three Services. The paralegal is an APS employee from the Department of Defence. The ODMP also has access to over 300 legal reservists located around Australia.³³

4.34 Prior to joining the ODMP, PLOs undertake a unit of discipline law as part of a Masters degree in Military Law. Upon assignment to the Office, PLOs are initially posted to state offices of police prosecutions for between six and twelve months. They then move to a three-month secondment with the NSW Office of Public Prosecutions. These external postings are designed to develop the practical skills required for effective legal advocacy.

4.35 PLOs are not required to hold practising certificates, but have been admitted to practise as a barrister or solicitor in the Supreme Court of the State where they were

31 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 1 March 2004, p. 56.

32 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 1 March 2004, p. 48.

33 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 1 March 2003, p. 63.

admitted.³⁴ The committee is aware a recent decision in the ACT Supreme Court, *Vance v Chief of Air Force*,³⁵ raised questions about the perceived independence and impartiality of PLOs arising from the fact that they are not required to hold practising certificates, regardless of whether or not they have been admitted to practise. The committee considers that to enhance their independence, PLOs should be required to hold practising certificates for ethical and professional conduct reasons. Further discussion concerning the independence and impartiality of PLOs is given below at para 4.58.

4.36 PLOs undertake a four week advanced course in military discipline law. The DMP and Deputy DMP also provide a degree of 'in house' training. The DMP considers that his staff would benefit greatly from longer secondments with civilian prosecuting authorities. Given the increasing workload, however, the ODMP has insufficient resources available to allow lengthy absences, despite the beneficial effects this would have.³⁶

4.37 The committee considers that the training and development requirements of ODMP personnel need to be addressed. Exposure to civilian processes and the practical skills garnered during secondments with civilian prosecuting authorities are vital to improving the quality of legal services provided by PLOs and will broaden the skills base within the Office.

Personnel— the Director of Military Prosecutions

4.38 The DMP is a Reserve Legal Officer, not a permanent member of the ADF. According to Colonel Hevey, the occupant of the position requires considerable civilian and military legal experience.³⁷ Evidence to the committee suggests that the DMP's reserve status is highly desirable, as sufficient civilian experience cannot generally be readily acquired by permanent ADF legal officers.

4.39 The DMP's role was originally envisioned as that of an 'overseer'. It was expected that he or she would attend the office for one week per month. The work involved in establishing the office has, however, meant that the current DMP, Colonel Hevey, has spent far more time in the Sydney office and travelling around Australia

34 Air Commodore Simon Harvey, Director General The Defence Legal Service, *Committee Hansard*, 6 August 2004, p. 12.

35 *Russell Vance v Air Marshall Errol John McCormack in his capacity as Chief of Air Force and the Commonwealth* [2004] ACTSC 78 (2 September 2004).

36 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 1 March 2003, p. 63.

37 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 2 August 2003, p. 47.

than anticipated.³⁸ He indicated to the committee that over the twelve months to August 2004, he spent more than half his working year acting in his capacity as DMP:

My last 15 months have required in excess of 140 days, which is, frankly, an enormous commitment. Over the last 12 months it has been in excess of 110 days. If we take a normal working year, it rounds out at about 200 working days per year after normal adjustments for weekends, leave et cetera. More than half my year has been devoted to trying to get this office up and running. That has meant that I have spent a lot of time in the office in Sydney, which is where we are currently located—about 40 days all told there. But there has been a lot of time spent either here in Canberra or around the traps, telling people that this office is up and running and introducing myself...there has been an establishment phase. It has been a demanding phase because, as well as the establishment, we have obviously had the committee and have had to attend to its requirements. We have had a Defence Force Discipline Appeal Tribunal hearing and we have had a matter before the High Court, so we have had a very demanding year. For the last financial year, my time in the service, as it were, is in excess of 110 days. So more than half of my working year has been spent doing this particular job.

4.40 The DMP position is established at the rank of Colonel. The rank of the position presents two problems. First, difficulty stems from a Colonel taking over the prosecutorial decision-making function of officers considerably higher up than he or she in the chain of command (one and two star General-equivalent officers). Second, the level of remuneration for a reserve legal officer with the rank of Colonel is approximately \$275 per day.³⁹ This is considerably below the rate that a reserve legal officer with the experience and qualifications required of the DMP could expect to receive in private practice.

4.41 This disparity between remuneration rates may operate as a barrier to attracting high quality personnel in the longer term. The current DMP indicated to the committee that he considers the work to be a 'labour of love' and does it 'because I am silly enough to think it is worthwhile'.⁴⁰ If the DMP's remuneration rate is not pegged at a level more commensurate with private rates, it cannot always be assumed that the position will attract personnel as experienced, committed and altruistic as Colonel Hevey.

4.42 The committee is mindful of the constraints faced by the ODMP. It is concerned about the training provided to staff and the level of resources assigned to the office in the face of rising workloads. Despite these concerns, the committee is

38 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 1 March 2003, p. 48.

39 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 2 August 2004, p. 62. The occupant also is not entitled to leave or superannuation.

40 Colonel Gary Hevey, Director of Military Prosecutions, *Committee Hansard*, 1 March 2003, p. 62.

nonetheless very impressed with the work of the ODMP to date. It considers that despite the difficulties mentioned, the DMP is doing an admirable job. The committee has no doubt that, if given adequate resources, a statutory mandate, and more time to develop its operational capability, the ODMP will continue to provide an invaluable service to the ADF.

Findings and Recommendations

4.43 The committee holds the view that decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory crimes should be referred in the first instance to civilian prosecuting authorities. The DMP should only exercise a decision-making function where there is no civilian equivalent crime, or where matters have been referred back from the civilian authorities.

Recommendation 7

4.44 The committee recommends that all decisions to initiate prosecutions for civilian equivalent and Jervis Bay Territory offences should be referred to civilian prosecuting authorities.

Recommendation 8

4.45 The committee recommends that the Director of Military Prosecutions should only initiate a prosecution in the first instance where there is no equivalent or relevant offence in the civilian criminal law. Where a case is referred to the Director of Military Prosecutions, an explanatory statement should be provided explaining the disciplinary purpose served by pursuing the charge.

Recommendation 9

4.46 The committee recommends that the Director of Military Prosecutions should only initiate prosecutions for other offences where the civilian prosecuting authorities do not pursue a matter. The Director of Military Prosecutions should only pursue a matter where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.

Recommendation 10

4.47 The committee recommends that the Government legislate as soon as possible to create the statutorily independent Office of Director of Military Prosecutions.

Recommendation 11

4.48 The committee recommends that the ADF conduct a review of the resources assigned to the Office of the Director of Military Prosecutions to ensure it can fulfil its advice and advocacy functions and activities.

Recommendation 12

4.49 The committee recommends that the ADF review the training requirements for the Permanent Legal Officers assigned to the Office of the Director of Military Prosecutions, emphasising adequate exposure to civilian courtroom forensic experience.

Recommendation 13

4.50 The committee recommends that the ADF act to raise awareness and the profile of the Office of the Director of Military Prosecutions within Army, Navy and Air Force.

Recommendation 14

4.51 The committee recommends that the Director of Military Prosecutions be appointed at one star rank.

Recommendation 15

4.52 The committee recommends the remuneration of the Director of Military Prosecutions be adjusted to be commensurate with the professional experience required and prosecutorial function exercised by the office-holder.

Defence Counsel Services

4.53 In addition to the legal advice provided to Commanding Officers for the prosecution of Service offences, the committee has also considered the legal advice available to Service personnel accused of committing Service offences.

4.54 Currently, legal advice at Commonwealth expense is available to members who are being investigated or charged with an offence under the DFDA.⁴¹ The committee notes, however, that there are conditions attached to securing assistance.

4.55 The DLM provides that, in summary hearings, an accused has the right to conduct his or her own defence or request the services of a member of the Defence Force to defend him or her. Where the services of the requested person are reasonably available, the person must be permitted to defend the accused. The manual expressly states, however:

There is no right to be represented by a legal officer unless a commanding officer or a superior summary authority permits a legal officer to act as the defending officer.⁴²

4.56 At the summary level, the right to be *represented* by a Legal Officer is therefore contingent upon the permission of the Commanding Officer. At courts

41 General Peter Cosgrove, Chief of Defence Force, *Submission P16*, p. 14.

42 *Discipline Law Manual ADFP 201, Vol 1*, para. 7.45.

martial and DFM trials, an accused person may be represented by any member of the Defence Force or by any legal practitioner. Pre-trial advice is available free of cost from a permanent or reserve legal officer.⁴³

4.57 When Service members are in custody for an offence, they should be advised that they may speak with a legal practitioner of their choice. Members are then given a list of legal officers. The JAG appoints legal officers on the list. All ADF legal officers are admitted to practise as a barrister or solicitor of the Supreme Court of the state where they were admitted to practice. Reserve Legal Officers (RLOs) hold practising certificates and are bound by the rules of ethics and professional conduct governing the law societies (or equivalent) of which they are members. Permanent Legal Officers (PLOs), however, are not required to hold practising certificates and are therefore not bound by the same rules of ethics and professional conduct as their Reserve colleagues.⁴⁴

4.58 Concerns have been raised with the committee that the absence of a requirement that PLOs hold practicing certificates may impact upon perceived or real impartiality and independence. The committee has already noted that the recent ACT Supreme Court decision *Vance v Chief of Air Force* raises questions about the status of PLOs due to this systemic failing (see para. 4.35).

4.59 The committee is concerned that PLOs may not have a sufficient degree of perceived or real impartiality and independence. The committee has already noted that the recent ACT Supreme Court decision *Vance v Chief of Air Force* cast considerable doubt on the status of PLOs⁴⁵ (see para. 4.35).

4.60 In the *Vance* decision, Justice Crispin determined that PLOs lack perceived independence, basing his decision on the absence of practising certificates. He observed that PLOs were not bound by the same rules of professional conduct or codes of ethics as lawyers holding practising certificates, and also are not required to undertake continuing legal education. He stated:

The law is substantially dependent upon trust in the competence and integrity of legal practitioners to obviate or at least reduce that risk [of spurious claims to lawyer-client privilege]. That trust is not based solely upon the possession of academic qualifications in law or admission as legal practitioners. It is based largely upon continued good standing in a profession that takes active steps to ensure the maintenance of appropriate ethical and professional standards. It does so by fostering awareness of its traditions of integrity and service, by the influence of peers, by the need for practitioners to demonstrate continuing compliance with ethical and

43 *ibid.* para. 8.57.

44 Air Commodore Simon Harvey, Director-General Defence Legal Service, and Colonel Ian Westwood, Chief Judge Advocate *Committee Hansard*, 6 August 2004, p. 12.

45 *Russell Vance v Air Marshall Errol John McCormack in his capacity as Chief of Air Force and the Commonwealth* [2004] ACTSC 78 (2 September 2004).

professional standards and in most jurisdictions participation in continuing legal education in order to maintain practising certificates.

In contrast, as Commodore Smith [DGTDLs at the time of this trial] conceded, DLOs are not required to keep abreast of relevant changes in the rules of practice or legal ethics.⁴⁶

4.61 Justice Crispin observed that PLOs could be lawfully ordered to act in a manner contrary to the standards set in codes of ethics and professional conduct. He also noted that a culture existed in the Defence Forces 'within which there may be scant recognition of the need for independence'.⁴⁷ He observed that the two legal officers in *Vance* case:

Had been so influenced by the cultural milieu within which they worked that they were effectively unable to make an independent judgement based on legal and ethical duties that should have been accepted without question by any legal practitioner.⁴⁸

4.62 Justice Crispin made particular reference to the position of PLOs appointed to defend Service personnel charged with disciplinary offences. He stated there was evidence in this particular case that the legal officers seemed unable to understand the need to act independently. In his judgement he identified an incontrovertible conflict between the duty the PLO owed to the defendant, and his or her position as a member of the ADF:

Any lawyer representing a person at any hearing, let alone a criminal trial, must obviously regard that person as his or her client ... and as Street CJ said in *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, at 170, there can be no doubt that 'the duty of a solicitor to his client is paramount, and that he must not prefer his or the interest of another to that of his client'. The mere fact that he or she has been employed or retained by some other person or body to represent the client does not in any way relieve him or her of that duty. Hence, a lawyer engaged by a legal aid body to represent an accused person would clearly breach his or her duty by accepting any instruction not to take any steps in the client's interests that might embarrass or otherwise adversely affect that body's interests.

It is true that lawyers should generally seek to avoid such conflicts of interest and that, if the interests of the client and instructing solicitors conflict, counsel should normally advise the solicitors that they should decline to accept further instructions in the matter and refer the client to independent solicitors. However, the terms of s 137 of the Discipline Act and the relevant portion of the Australian Defence Force Administrative Inquiries Manual clearly contemplate the allocation of DLOs to represent members of the ADF in circumstances in which such conflicts are likely to arise. **In this context it is difficult, if not impossible, to see how the ADF**

46 *Vance v Chief of Air Force*, paras 42–43.

47 *Vance v Chief of Air Force*, para. 83.

48 *Vance v Chief of Air Force*, para. 70.

could comply with the requirements of the Act and/or Manual without placing DLOs in a position in which they were forced to choose between adhering to their duty to the client and infringing the direction [not to provide advice that may be contrary to the Commonwealth's interests].

It is also true that, viewed over all, the interests of the Commonwealth may be served by allocating DLOs to represent people accused of offences or likely to be affected by inquiries, and thereby facilitating fair and effective hearings. However, the direction does not suggest that the interests of the Commonwealth should be given priority only in that sense and it seems unlikely that it was either intended to be or was likely to be construed in such a theoretical or systemic manner. It seems rather to reflect a perception that, **whilst some conflicts of interest may be intolerable, DLOs should generally defend or otherwise represent people who may be accused of committing offences under Commonwealth law or of misconduct in connection with duties owed to the Commonwealth whilst, at the same time, continuing to accept an overriding duty not to provide advice that may be contrary to the Commonwealth's interests. Such an approach is entirely incompatible with what Street CJ described as the 'paramount' duty which a legal practitioner owes to his or her client.**⁴⁹

4.63 Justice Crispin considered, however, that RLOs are in a different position to PLOs. He observed that, although the provisions of the DFDA imposing criminal sanctions for disobedience to superior orders apply to RLOs rendering continuous full-time service, on duty or in uniform, there are a number of considerations that grant them greater independence and impartiality than their permanent colleagues. The primary distinguishing factor was the possession of practising certificates. His Honour also noted that the nature of RLO's duties require them to be involved 'in the ADF culture on only a part-time basis.'⁵⁰

4.64 The committee questioned the Director-General of the Defence Legal Service, Air Commodore Harvey, and the Chief Judge Advocate, Colonel Westwood, at length concerning the absence of a requirement to possess practicing certificates and the associated perceived lack of PLO independence.⁵¹ A committee member questioned Air Commodore Harvey concerning conflicts inherent in the dual function of providing advice to commanding officers and defending personnel accused of committing Service offences. Air Commodore Harvey stated that the issues concerned a 'perception rather than a reality'.⁵² When a number of scenarios were put to Air Commodore Harvey wherein a conflict could potentially arise, he conceded:

49 *Vance v Chief of Air Force*, paras 77–79. Emphasis added.

50 *Vance v Chief of Air Force*, para. 93.

51 *Committee Hansard* 6 August 2004, pp. 10–25.

52 *Committee Hansard* 6 August 2004, p. 23.

It is something that I recognise is an issue that has to be very carefully managed and we are alert to it.⁵³

4.65 The committee agrees with the findings made by Justice Crispin in the *Vance* decision concerning the flaws inherent in a system that does not require its lawyers to possess practicing certificates, and the impact this may have on perceived independence and impartiality. The committee is concerned that the potential exists for a lack of independence to go beyond perception and constitute reality. Practicing certificates require that lawyers undergo continual training to maintain their skills, and mandate that lawyers continually uphold and conform to codes of ethical and professional conduct. The committee considers that all PLOs should possess practising certificates—PLOs should be required to continually update their skills, and should be held to the same ethical and professional codes of conduct as other legal practitioners. The current failure of the military justice system to require that PLOs possess practicing certificates lets down PLOs and ordinary service personnel alike. The committee also notes that the Canadian Government has legislated to establish an independent Director of Defence Counsel Services, staffed by legal officers that *must* possess practising certificates.

The Canadian Director of Defence Counsel Services⁵⁴

4.66 As part of a broad-ranging legislative program to reform its military justice system, the Canadian Government legislated to establish the office of the Director of Defence Counsel Services (DDCS).

4.67 The DDCS is an experienced lawyer who is also a legal officer in the Canadian Forces. The DDCS is appointed by the Minister of National Defence, and not through the chain of command. The Office of the DDCS provides legal counsel services to accused persons:

- at courts martial;
- who may be/are unfit to stand trial;
- in hearings for release from custody pending appeal, and retention in custody; and
- in appeals to the Court Martial Appeal Court or Supreme Court of Canada on the legality of a finding or severity of a punishment.

4.68 The Office also provides advisory services to:

- persons arrested or detained in respect of a Service offence;

53 *Committee Hansard*, 6 August 2004, p. 24.

54 The information for this section is drawn from *Director of Defence Counsel Services Manual* (No publication date specified), p. 4. Available from: http://www.forces.gc.ca/jag/military_justice/ddcs/publications/manual/complete_e.pdf unless otherwise specified.

- 'assisting officers' or accused persons with respect to electing trials by court martial;
- 'assisting officers' or accused persons on matters of a general nature relating to summary trials; and
- persons subject to an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry.

4.69 Legal counsel and general advisory services are provided by qualified lawyers. DDCS lawyers are members of the Canadian Forces, and perform their duties under the supervision of the Canadian JAG. In addition to their obligations and duties under the National Defence Act, the Code of Service Discipline, and the Queens Regulations and Orders, they are also bound by the codes of professional conduct associated with the relevant law societies to which they belong. DDCS lawyers provide their clients with services akin to those typically provided by criminal lawyers in the civilian practice of law. The legislative framework creating the office of the DDCS is structured in a manner designed to enhance the independence of DDCS lawyers to the fullest extent possible:

DDCS lawyers perform their duties and provide their services independent of the chain of command and of CF and Department of National Defence disciplinary and enforcement authorities. The sole restraints on the provisions of their services are those imposed by law and by professional ethics, including the requirements and constraints of solicitor-client privilege

...

In conducting their lawful and ethical activities in their capacity as defence counsel, DDCS are legally immune from any influence or authority purported to be exercised by the chain of command.⁵⁵

4.70 At summary level, accused persons are not entitled to legal representation. However, accused persons, or the officer appointed to assist them through the summary process, may obtain the advice of a DDCS lawyer on general matters relating to the summary trial process. 'Assisting Officers' are not generally legally trained. It is their duty and responsibility:

- to assist in the preparation of and presentation at summary trial of the accused's case to the extent desired by the accused; and
- prior to the accused making an election to be tried by summary trial or court martial, to ensure that the accused is aware of the nature and

55 Director of Defence Counsel Services *Manual* (No publication date specified), section 1–4 and 3–4. Available from:
http://www.forces.gc.ca/jag/military_justice/ddcs/publications/manual/complete_e.pdf

gravity of the offences which he or she has been charged and of the differences between a summary trial and a court martial.⁵⁶

4.71 At the court martial level, personnel are entitled to the services of and representation by a DDCS lawyer free of charge, or they may retain a civilian lawyer at their own expense or, where qualifying criteria are met, with the assistance of a provincial legal aid plan.

4.72 In discussing the establishment of the DDCS and the requisite degree of independence, the Canadian JAG stated:

Military defence counsel must defend their clients against the prosecutorial powers of the State in circumstances where their client's actions and the defence counsel's arguments may be highly unpopular with senior members of the Canadian Forces. It is important to avoid any unnecessary or unintentional derogation from the actual and perceived independence of DDCS counsel.⁵⁷

4.73 In his independent review of the Canadian military justice system, the Rt Hon Antonio Lamer commented:

The creation of the DDCS was a great step forward in affording members of the Canadian Forces the protection of legal advice and representation that is intended to be independent of the chain of command.⁵⁸

4.74 The committee notes the capacity for the Canadian DDCS to provide Service personnel with access to more independent and impartial legal advice than is currently available in Australia, and considers that the Australian Defence Force should provide similar access to its Service personnel.

Recommendation 16

4.75 The committee recommends that all Permanent Legal Officers be required to hold current practicing certificates.

Recommendation 17

4.76 The committee recommends that the ADF establish a Director of Defence Counsel Services.

56 In Australia, Defence Force personnel may only elect a court martial/DFM trial after the Summary Authority has heard the evidence adduced by the prosecution and determined that it supports the charge. After the Summary Authority has awarded a conviction, personnel may also elect to be punished by a court martial or DFM. (s131 DFDA).

57 Quoted in The Rt Hon Justice Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D., of the Provisions and operation of Bill C-2*, pp. 15–16.

58 The Rt Hon Justice Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D., of the Provisions and operation of Bill C-2*, p. 14.